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Supreme Court of the United States

OCTOBER TERM, 1994

JERRY WARTSKI, JAY WARTSKI and ALAN WARTSKI, *et al.*,

Petitioners,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

ADDITIONAL REASONS FOR GRANTING THE PETITION 1

I. THE COURT SHOULD RESOLVE THE MULTIPLE CONFLICTS AMONG THE COURTS OF APPEALS CONCERNING THE APPROPRIATE REMEDY FOR THE GOVERNMENT'S FAILURE TO PROVIDE NOTICE AND AN OPPORTUNITY FOR A HEARING BEFORE SEIZING REAL PROPERTY .. 2

A. The Wartskis Did Not Waive Their Due Process Right To Notice And A Hearing 2

B. The Sixth And Seventh Circuits Have Joined The Eighth And Ninth Circuits In Holding That Suppression Of Evidence In Forfeiture Proceedings Is An Inadequate Remedy Where There Has Been A Seizure Of Real Property Without Notice And A Hearing 4

II. THE COURT SHOULD RESOLVE THE MULTIPLE CONFLICTS AMONG THE COURTS OF APPEALS CONCERNING THE PROPER INTERPRETATION OF THE "INNOCENT OWNER" PROVISION OF SECTION 881(b) 5

III. THE COURT SHOULD RESOLVE THE MULTIPLE CONFLICTS AMONG THE COURTS OF APPEALS CONCERNING THE PROPER PARAMETERS FOR AN EXCESSIVE FINES ANALYSIS IN THE CONTEXT OF AN *IN REM* FORFEITURE 6

CONCLUSION 10

TABLE OF AUTHORITIES

Page(s)

CASES

Austin v. United States,
113 S. Ct. 2801 (1993) 2

United States v. Chandler,
36 F.3d 358 (4th Cir. 1994),
cert. denied, 115 S. Ct. 1792 (1995) 6

United States v. 16510 Ashton,
47 F.3d 1465 (6th Cir. 1995) 4

United States v. 2030 E. Monroe St.,
884 F. Supp. 1218 (C.D. Ill. 1995) 4

United States v. 2130 W. Harbor Dr.,
48 F.3d 289 (8th Cir. 1995) 2

United States v. 429 S. Main St.,
52 F.3d 1416 (6th Cir. 1995) 3, 4

United States v. 6380 Little Canyon Rd.,
59 F.3d 974 (9th Cir. 1995) 3, 5, 7, 8, 9

United States v. 9638 Chicago Heights,
27 F.3d 327 (8th Cir. 1994) 2

United States v. All Assets & Equip. of W. Side Bldg. Corp.,
58 F.3d 1181 (7th Cir. 1995) 3, 5

United States v. James Daniel Good Real Property,
114 S. Ct. 492 (1993) 2

United States v. Lots 12, 13, 14, & 15, Keeton Heights Subdivision,
869 F.2d 942 (6th Cir. 1989) 5

Page(s)

United States v. Milbrand,
58 F.3d 841 (2d Cir. 1995) 7

United States v. RR No. 1, Box 224, Dalton,
14 F.3d 864 (3d Cir. 1994) 3

STATUTES

21 U.S.C. § 881(b)(1995) 2

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Jerry Wartski, Jay Wartski and Alan Wartski (collectively, "the Wartskis"), general partners of 560 Realty Company ("560 Realty"), submit this reply brief in further support of their petition for a writ of certiorari ("Petition" or "Pet.") pursuant to Rule 15.6 of the Rules of this Court.

By this reply brief, the Wartskis respond to certain of the contentions raised by the government in its brief in opposition to the Petition ("Brief in Opposition" or "Brief in Opp."), and refer the Court to several decisions that have been handed down since the filing of the Petition, all of which further reflect splits in Court of Appeals authority warranting that the Petition be granted.

ADDITIONAL REASONS FOR GRANTING THE PETITION

In the Petition, the Wartskis argued that certiorari should be granted (i) to resolve the split among the Second,

Eighth and Ninth Circuits as to the proper remedy when the government seizes real property pursuant to 21 U.S.C. § 881(b) without prior notice and an opportunity to be heard, as this Court held was required by the Due Process Clause in its decision in *United States v. James Daniel Good Real Property*, 114 S. Ct. 492 (1993) ("*Good*") (Pet. at 12-19), (ii) to resolve the split between the Second and Sixth Circuits as to the meaning of "consent," as Congress used that term in the "innocent owner" provision of § 881(b), and to rectify the government's systematic misapplication of that provision (Pet. at 20-25), and (iii) to define the parameters of a proper analysis under the Excessive Fines Clause of the Eighth Amendment when the government seeks to forfeit real property pursuant to 21 U.S.C. § 881(a)(7), as this Court held was required in its decision in *Austin v. United States*, 113 S. Ct. 2801 (1993) ("*Austin*") (Pet. at 26-30). The sharp divergence of Court of Appeals authority, and the importance of the issues raised by the Petition, are apparent even from the government's Brief in Opposition. Moreover, further developments since the filing of the Petition, with respect to both the due process issue and the excessive fines issue, confirm that this case is worthy of certiorari.

I. THE COURT SHOULD RESOLVE THE MULTIPLE CONFLICTS AMONG THE COURTS OF APPEALS CONCERNING THE APPROPRIATE REMEDY FOR THE GOVERNMENT'S FAILURE TO PROVIDE NOTICE AND AN OPPORTUNITY FOR A HEARING BEFORE SEIZING REAL PROPERTY

A. The Wartskis Did Not Waive Their Due Process Right To Notice And A Hearing

The government does not seriously dispute that the decisions of the Eighth Circuit in *United States v. 9638 Chicago Heights*, 27 F.3d 327, 330 (8th Cir. 1994), and *United States v. 2130 W. Harbor Dr.*, 48 F.3d 289, 291 (8th Cir. 1995), requiring the dismissal of forfeiture actions where the government has failed to provide notice and a hearing prior to the seizure of

real property, are irreconcilable with the Second Circuit's pronouncement below that the failure to accord such notice and a hearing requires no such remedy. Rather, the government asserts, incorrectly, that the Wartskis "supply no authority" (Brief in Opp. at 9) for the proposition that the Court should even reach the issue, given that the Wartskis raised the issue for the first time by post-judgment motion, albeit promptly after the issuance of this Court's decision in *Good*.[1]

In fact, *9638 Chicago Heights* and *2130 W. Harbor Dr.*, both of which were cited in the Petition, support that very proposition. Moreover, since the filing of the Petition, the Sixth, Seventh and Ninth Circuits have joined the Third and Eighth Circuits in holding that the due process issue presented by *Good* should be considered even where judgment was entered prior to the issuance of *Good*, and therefore prior to the raising of the issue by the claimant. *E.g., United States v. 429 S. Main St.*, 52 F.3d 1416, 1419 (6th Cir. 1995); *United States v. All Assets & Equip. of W. Side Bldg. Corp.*, 58 F.3d 1181, 1191 (7th Cir. 1995); *United States v. 6380 Little Canyon Rd.*, 59 F.3d 974, 980 (9th Cir. 1995); *see also United States v. RR No. 1, Box 224, Dalton*, 14 F.3d 864, 869 n.5 (3d Cir. 1994).

In short, *every* other Circuit that has considered the issue has disagreed with the Second Circuit and the government, and has concluded that, so long as a judgment has not become final, the entry of that judgment prior to the decision in *Good* will not preclude enforcement of the important due process rights that were recognized in that case.

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[1] The government acknowledges that, prior to this Court's decision in *Good*, the argument that the Due Process Clause required notice and a hearing prior to the seizure of non-residential real property was foreclosed in the Second Circuit (Brief in Opp. at 10-11 n.3).

B. The Sixth And Seventh Circuits Have Joined The Eighth And Ninth Circuits In Holding That Suppression Of Evidence In Forfeiture Proceedings Is An Inadequate Remedy Where There Has Been A Seizure Of Real Property Without Notice And A Hearing

Subsequent to the filing of the Petition, a district court, in *United States v. 2030 E. Monroe St.*, 884 F. Supp. 1218 (C.D. Ill. 1995), noting the split among several circuits, interpreted the Sixth Circuit's decision in *United States v. 16510 Ashton*, 47 F.3d 1465 (6th Cir. 1995), as mandating the dismissal of a forfeiture action where there has been a seizure of real property without notice or a hearing. *2030 E. Monroe St.*, 884 F. Supp. at 1225 n.2. In contrast, the Second Circuit would merely exclude at trial any evidence obtained as a result of such seizure.

As recounted by the court in *2030 E. Monroe St.*, the Sixth Circuit, in *16510 Ashton*, 47 F.3d at 1471 (citing *Good*, 114 S. Ct. at 505), reversed the district court's grant of summary judgment in favor of the government, noting that the government's failure to provide the property owner with a pre-seizure adversarial hearing to contest the government's showing of probable cause and to establish himself as an innocent owner was "dispositive." Thus, the Sixth Circuit has joined the Eighth Circuit in requiring the dismissal of forfeiture actions where there has been a seizure of real property without notice and a hearing. *Cf. 429 S. Main St.*, 52 F.3d at 1421 (remanding to district court without reaching issue of remedy).

Moreover, also subsequent to the filing of the Petition, the Seventh Circuit, joining the Ninth Circuit, disagreed with both the Second and Eighth Circuits and held that an owner in a forfeiture proceeding is entitled to lost rents, and possibly other damages, arising from the unlawful seizure of real

property without notice or a hearing, but is not entitled to dismissal of the proceedings altogether. *E.g., All Assets and Equip. of W. Side Bldg. Corp.*, 58 F.3d at 1193; *see also 6380 Little Canyon Rd.*, 59 F.3d at 981. A grant of certiorari in this case would thus permit this Court to resolve the several splits among the circuits as to the proper remedy in a forfeiture action where, as here, there has been a seizure of real property without notice and a hearing.[2]

II. THE COURT SHOULD RESOLVE THE MULTIPLE CONFLICTS AMONG THE COURTS OF APPEALS CONCERNING THE PROPER INTERPRETATION OF THE "INNOCENT OWNER" PROVISION OF SECTION 881(b)

The government's Brief in Opposition fails to come to grips with the patent conflict addressed in the Petition between the Second Circuit's decision, requiring a claimant to show that it took "all reasonable steps" to prevent drug activity on its property, and the Sixth Circuit's decision in *United States v. Lots 12, 13, 14, & 15, Keeton Heights Subdivision*, 869 F.2d 942 (6th Cir. 1989), specifically instructing that no such showing is necessary. Rather, by describing the jury charge as requiring only that the Wartskis show that they did "all that reasonably could be expected of them under the circumstances[,]" the government apparently seeks, as it did in

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[2] Acknowledging that Petitioners do "challenge (Pet. App. at 15-17) the Court of Appeals' alternative holding (Pet. App. at 3a-4a) that exigent circumstances justified dispensing with ordinary requirements of pre-seizure notice and a hearing" (Brief in Opp. at 10 n.2), the government nonetheless erroneously asserts that Petitioners do not seek review of that holding. On the contrary, such a challenge is plainly subsumed within the first Question Presented in the Petition, *i.e.*, whether the government's failure to provide notice and a hearing, as required by *Good*, requires dismissal of this forfeiture action.

the Court of Appeals, to avoid the consequences of its own insistence that the jury in fact be instructed that the Wartskis had to show that they took "every action that was reasonable" and "all reasonable steps" to prevent drug trafficking. *Compare* Brief in Opp. at 6 *with* Pet. App. at 14a-17a.

Nor has the government, by characterizing this Court's interpretation of the innocent owner provision in *Austin* as an "observation" that "formed part of [the Court's] reasoning" (Brief in Opp. at 14), rendered that interpretation any the less irreconcilable with the markedly counterintuitive conception of "consent" that was applied by the courts below. The Court's teaching in *Austin*, that the innocent owner provision reflects Congress' intention that real property be forfeited only from persons "involved in drug trafficking," was integral to the Court's holding in that case, and simply cannot be squared with the position that the government takes here.

III. THE COURT SHOULD RESOLVE THE MULTIPLE CONFLICTS AMONG THE COURTS OF APPEALS CONCERNING THE PROPER PARAMETERS FOR AN EXCESSIVE FINES ANALYSIS IN THE CONTEXT OF AN *IN REM* FORFEITURE

The government contends that a grant of certiorari to consider the Excessive Fines claim raised by the Wartskis would be premature because only the Fourth Circuit, in *United States v. Chandler*, 36 F.3d 358, 365 (4th Cir. 1994), *cert. denied*, 115 S. Ct. 1792 (1995), in addition to several district courts, has announced a definitive standard for conducting an Excessive Fines analysis (Brief in Opp. at 16-17). Subsequent to the filing of the government's Brief in Opposition, however, the Second and Ninth Circuits have also definitively addressed the Excessive Fines issue. *E.g., United States v. Milbrand*, 58 F.3d 841, 845-48 (2d Cir. 1995); *6380 Little Canyon Rd.*, 59 F.3d at 981-87.

Both the Second and Ninth Circuits disagree with *Chandler*, in particular with respect to the importance to the analysis of the culpability of the owner relative to the value of the property to be forfeited. Thus, a grant of certiorari is warranted at this time to resolve this important conflict.

As the Second Circuit noted in *Milbrand*, "the Fourth Circuit has largely adopted the instrumentality analysis espoused by Justice Scalia." 58 F.3d at 846. The *Milbrand* Court, however, held "that appropriate excessiveness analysis entails a multi-factor test combining the principles of both instrumentality and proportionality." *Id.* at 847. The Ninth Circuit, in contrast, perceived the instrumentality test as, in effect, synonymous with the threshold statutory standard for forfeitability. *6380 Little Canyon Rd.*, 59 F.3d at 982 ("the forfeiture must be determined to have been proper. That is, the property must have been an 'instrumentality' of the crime...."). Noting this Court's teaching in *Austin* that, "[f]or purposes of the Excessive Fines Clause, 'the question is not...whether forfeiture...is civil or criminal, but rather whether it is punishment,'" 59 F.3d at 983, (quoting *Austin*, 113 S. Ct. at 2806), the Ninth Circuit in *6380 Little Canyon Rd.* concluded that "[o]nly by adding a proportionality test is the 'excessiveness' of the fine determined by weighing both the *in rem* and *in personam* punishments against the seriousness of the crime." 59 F.3d at 983.

The Ninth Circuit emphasized in *6380 Little Canyon Rd.* that, because it is the owner who is punished by the forfeiture, it is the owner -- not tenants or other third parties -- whose conduct must be weighed:

> [T]he worth of the property must be "proportional (not excessive) to the culpability *of the owner* .... [U]nder the "proportionality" test, forfeiture of the property must not impose upon

> the owner a penalty grossly disproportionate *to his offense.*

Id. at 982 (emphasis added). In conducting the proportionality analysis, the court further instructed that, "[i]n any instance in which forfeiture of a single tract would contravene the Excessive Fines Clause, the court should limit it to an appropriate portion or the more poisonously tainted portion of the property."

The government substantially distorts the Wartskis' contention with respect to the Excessive Fines Clause, reciting that, "[i]n particular, petitioners assert (Pet. at 30) that the forfeiture of the entire building is disproportionate to the amount of illegal activity that occurred there." (Brief in Opp. at 15). Petitioners do contend that only a portion of the residences at the property -- and none of the physically segregated income producing stores -- was the site of any drug-related activity. They also contend that the property was not the instrumentality of any drug activity. But the crux of the matter is that the Wartskis are innocent of *any* drug activity. The verdict below establishes only that the jurors were able, during the course of their deliberations, to come up with at least one possible additional step that the Wartskis could have taken to prevent drug activity, which step could be characterized as reasonable. The taking by the government of a multi-million dollar residential and commercial building from persons not involved in any drug activity, based on such a finding is both excessive and reprehensible.[3]

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[3] Casting about for some justification for this untoward result, the government irresponsibly speculates that the desk clerk (misidentified as the "executive manager") was himself "apparently involved in drug dealing," based on evidence that a police dog was thought to have detected the scent of narcotics

(continued...)

As the court observed in *6380 Little Canyon Rd.*, "proportionality analysis is especially appropriate in the civil forfeiture context because it is the sovereign that profits from such forfeitures." *Id.* at 984. The Court should grant certiorari to establish uniform standards for conducting this sensitive and critical analysis.

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[3](...continued)
on the floor in his private residence. (Brief in Opp. at 4, 7). The government further incorrectly asserts, without benefit of any record citation, that the desk clerk "knowingly rented blocks of rooms to drug dealers" (Brief in Opp. at 17), apparently based on evidence that, *after* the rooms had been rented, the desk clerk accepted rental payments from one individual for several rooms. Neither the district court nor the jury ever made any such findings. Moreover, notwithstanding the government's professed grave concern as to the conduct of the desk clerk, it continues to this day to lease a store in the building to this individual.

CONCLUSION

For the foregoing reasons, and for the reasons stated in the Petition, the Petition should be granted.

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Respectfully submitted,

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